

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

IJL MIDWEST MILWAUKEE, LLC, and
SARA DARLING,

Plaintiffs,

IT'S JUST LUNCH INTERNATIONAL,
LLC,

Defendant.

And all related counterclaims.

Case No.: 2:19-cv-01006-APG-EJY

Order Granting in Part Defendant's Motion for Summary Judgment

[ECF No. 52]

11 Plaintiff-franchisee Sara Darling and defendant-franchisor It's Just Lunch International,
12 LLC (IJL) engaged in several franchise agreements by which Darling operates dating service
13 franchises across the country. Plaintiff IJL Midwest Milwaukee, LLC (Milwaukee) is one such
14 franchise. Amid a revenue and royalty dispute, IJL did not respond to Darling's franchise-
15 renewal request for Milwaukee. Darling and Milwaukee now sue IJL for contractual breaches
16 and interference, and violations of multiple state franchise statutes. IJL counterclaims for
17 contractual breaches. Both sides seek declaratory relief. IJL also filed a so-called third-party
18 complaint¹ asserting the allegations from its counterclaim against Darling's other franchise

¹ Under Federal Rule of Civil Procedure (FRCP) 14, a defendant may serve “a third-party complaint upon a person not a party to the action who is or may be liable to the original defendant for all or part of the plaintiff’s claim.” *United States v. One 1977 Mercedes Benz*, 450 SEL, VIN 11603302064538, 708 F.2d 444, 452 (9th Cir. 1983) (simplified). Thus, “a third-party claim may be asserted only when . . . the third party’s liability is secondary or derivative” to the liability of the original defendant. *Id.* IJL’s third-party complaint against Darling’s remaining franchises does not seek indemnification for the plaintiffs’ original claims. As a result, IJL’s third-party complaint is improper. I have no reason to believe that joinder of these franchises under FRCP 19 or 20 would have been improper, and the parties do not dispute this procedural defect. So, in the interest of efficiency, I will treat the so-called third-party defendants as joined

1 locations. These franchisees in turn assert claims against IJL, largely mimicking the plaintiffs'
 2 original claims.² IJL moves for summary judgment on all claims.

3 I grant in part IJL's motion for summary judgment. The parties do not dispute that the
 4 franchisees owe IJL \$278,117.00 for its breach of contract counterclaim. Any amount owed in
 5 excess of that is genuinely disputed. The franchisees' claim for tortious interference is unripe.
 6 The parties genuinely dispute material facts about the remaining claims and counterclaims for
 7 declaratory judgment and breach of the implied covenant, as well as the franchisees' claims for
 8 breach of contract, violation of the Minnesota Franchise Act (MFA), violation of the Wisconsin
 9 Fair Dealership Law (WFDL), and violation of the Illinois Franchise Disclosure Act (IFDA).
 10 Consequently, I also deny summary judgment on whether injunctive relief is appropriate.

11 **I. BACKGROUND**

12 IJL is the franchisor of a nation-wide dating and match-making service. ECF Nos. 52 at
 13 4; 53 at 5. Darling operates six IJL franchises in Minneapolis, Milwaukee, Chicago, Denver,
 14 Cleveland, and Washington, D.C. ECF Nos. 52 at 4-5; 53 at 5; 53-8 at 2. In August 2018, IJL
 15 sent notices of default to each of the six franchisees, explaining in relevant part that they "failed
 16 to provide IJL . . . with [their] [f]inancial [r]eports" required in their franchise agreements. ECF
 17 No. 52-2 at 224, 229, 233, 237, 241, 245.³ The franchisees provided the requested reports to IJL,
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20 plaintiffs, their claims as brought in the first instance, and IJL's claims against them as
 21 counterclaims.

22 ² The newly implicated franchisees allege: (1) breach of contract; (2) breach of the implied
 23 covenant of good faith and fair dealing; (3) violation of the Illinois Franchise Disclosure Act;
 24 and (4) violation of the Minnesota Franchise Act. They also seek declaratory judgment.

25 ³ I advise the parties to comply with Local Rules IA 10-3 and IC 2-2(a)(3) in the future. Exhibits
 26 must be separately filed. I further advise the parties that "[d]ocuments filed electronically must
 27 be filed in a searchable" format. Local Rule IA 10-1.

1 and IJL determined that the franchisees had underreported gross revenue, resulting in deficient
2 royalty and fee payments. ECF No. 52-3 at 11.

3 While IJL engaged in a royalty investigation, Darling wrote to IJL on behalf of the
4 Milwaukee franchise, requesting a renewal of its franchise agreement. ECF No. 52-4 at 166. IJL
5 did not respond with renewal paperwork as requested. ECF Nos. 1-1 at 4; 36 at 3. In the wake of
6 IJL's refusal to send the paperwork for the Milwaukee location, Darling and Milwaukee filed
7 this lawsuit. ECF No. 1-1.

8 Darling and all six franchisees (collectively, "franchisees") sue IJL for: (1) breach of
9 contract; (2) breach of the implied covenant of good faith and fair dealing; (3) violations of the
10 MFA, WFDL, and IFDA; (4) tortious interference; (5) declaratory judgment; and (6) injunctive
11 relief. ECF Nos. 1-1; 46. IJL counterclaims, alleging breach of contract and breach of the
12 implied covenant of good faith and fair dealing, and seeking declaratory judgment. ECF No. 36.

13 IJL now moves for summary judgment, arguing that: (1) the franchisees concede that
14 they breached their contracts by making deficient royalty and fee payments; (2) I should decide
15 the deficiency amount as a matter of law because the contractual language on revenue and
16 royalty calculations is unambiguous; (3) I should declare that IJL may terminate or non-renew
17 the franchisees' agreements without providing an opportunity to cure because, as a matter of law,
18 the franchisees' breaches are incurable; (4) the franchisees' claims for breach and statutory
19 violations fail because IJL has yet to terminate or non-renew any of their franchise agreements;
20 and (5) the franchisees' remaining claims for tortious interference, declaratory relief, and
21 injunctive relief are either moot or unripe. The franchisees respond that: (1) their royalty
22 calculation is correct; (2) the royalty dispute does not constitute an incurable breach; (3) their
23 claims should remain pending because IJL intends to terminate or non-renew their agreements

1 without providing an opportunity to cure; and (4) IJL already violated statutory notice
 2 requirements.

3 **II. ANALYSIS**

4 Summary judgment is proper where a movant shows that “there is no genuine dispute as
 5 to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
 6 56(a). A fact is material if it “might affect the outcome of the suit under the governing law.”
 7 *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986). A dispute is genuine if “the evidence is
 8 such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* at 248. The
 9 moving party bears the initial burden of informing the court of the basis of its motion and the
 10 absence of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When the
 11 nonmoving party has the burden of proof at trial, the moving party need only point out “that
 12 there is an absence of evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325;
 13 see also *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000) (stating that
 14 the moving party can meet its initial burden by “pointing out through argument . . . the absence
 15 of evidence to support plaintiff’s claim”).

16 Once the moving party carries its burden, the nonmoving party must “make a showing
 17 sufficient to establish the existence of [the disputed] element to that party’s case.” *Celotex*, 477
 18 U.S. at 322. I need not “scour the record in search of a genuine issue of triable fact.” *Keenan v.*
 19 *Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). Instead, I “rely on the nonmoving party to identify
 20 with reasonable particularity the evidence that precludes summary judgment.” *Id.* I view the
 21 evidence and reasonable inferences in the light most favorable to the nonmoving party. *James*
 22 *River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

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1 **A. IJL's Breach of Contract Counterclaim**

2 IJL argues that the franchisees breached their franchise agreements by failing to pay IJL
 3 \$1,111,871.00 in royalties and fees.⁴ The franchisees admit they underpaid IJL, but they contend
 4 they owe only \$278,117.00.

5 Under Nevada law, “to succeed on a breach of contract claim, a plaintiff must show four
 6 elements: (1) formation of a valid contract; (2) performance or excuse of performance by the
 7 plaintiff; (3) material breach by the defendant; and (4) damages.” *Walker v. State Farm Mut.*
 8 *Auto. Ins. Co.*, 259 F. Supp. 3d 1139, 1145 (D. Nev. 2017) (quotation omitted). “[I]n the
 9 absence of ambiguity or other factual complexities,” contract interpretation “present[s a]
 10 question[] of law for the courts [that is] suitable for determination by summary judgment.”
 11 *Ellison v. Cal. State Auto. Ass'n*, 797 P.2d 975, 977 (Nev. 1990). “Contract interpretation strives
 12 to discern and give effect to the parties’ intended meaning.” *Galardi v. Naples Polaris, LLC*, 301
 13 P.3d 364, 367 (Nev. 2013). A contract is ambiguous if it “is subject to more than one reasonable
 14 interpretation.” *Anuvi, LLC v. G.L. Dragon, LLC*, 163 P.3d 405, 407 (Nev. 2007). Where a
 15 contract is ambiguous, summary judgment is inappropriate. *Mullis v. Nevada Nat. Bank*, 654
 16 P.2d 533, 536 (Nev. 1982).

17 The parties genuinely dispute the amount of royalties owed based on differing
 18 interpretations of the franchise agreements’ definition of gross revenue. ECF Nos. 52 at 13; 53 at
 19 19; 52-4 at 105, 156. In relevant part, the agreements define gross revenue as “all revenues from
 20 sales conducted upon or from the [business], and shall include, but not be limited to, the amounts
 21 received from the sale of services and products of every kind and nature.” ECF No. 52-1 at 20.
 22 This definition is susceptible to more than one reasonable interpretation because it is unclear
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⁴ This amount also incorporates prejudgment interest.

1 whether the terms “revenue” and “received” contemplate refunds, cancellations, and other
2 interactions that effectively moot the corresponding initial payments. This ambiguity must be
3 resolved by the trier of fact. But because the franchisees admit they owe at least \$278,117.00, I
4 grant summary judgment on IJL’s breach of contract counterclaim to that extent. Any damage
5 amount in excess of \$278,117.00 is genuinely disputed and must be determined by the trier of
6 fact after the resolution of the franchise agreements’ ambiguous terms.

7 **B. Franchisees’ Tortious Interference Claim**

8 IJL argues that it cannot have tortiously interfered with the franchisees’ contractual
9 relations or prospective economic advantage unless and until it fails to renew or terminates one
10 or more of their franchise agreements. IJL contends that because each franchise agreement is
11 still active, the franchisees’ claim is unripe. The franchisees respond that this claim is ripe
12 because IJL intends to terminate or non-renew the agreements in the future.

13 “The issue of ripeness is a question of law.” *In re Coleman*, 560 F.3d 1000, 1003 (9th
14 Cir. 2009). Ripeness chiefly concerns “timing,” and is intended “to separate matters that are
15 premature for review because the injury is speculative and may never occur from cases that are
16 appropriate for federal court action.” *Wolfson v. Brammer*, 616 F.3d 1045, 1057 (9th Cir. 2010)
17 (quotation omitted). Constitutional ripeness requires plaintiffs to “present concrete legal issues,
18 . . . not abstractions.” *Colwell v. Dep’t of Health & Hum. Servs.*, 558 F.3d 1112, 1123 (9th Cir.
19 2009) (quotation omitted).

20 The franchisees’ claim for tortious interference is unripe because IJL has not terminated
21 or non-renewed a franchise agreement. See *Wichinsky v. Mosa*, 847 P.2d 727, 730-31 (Nev.
22 1993) (providing that harm to the plaintiff is an element of tortious interference). Unless and
23 until ILJ does so, the franchisees’ claim is abstract and speculates as to IJL’s future conduct. I

1 therefore grant IJL's motion for summary judgment as to the franchisees' tortious interference
 2 claim, without prejudice to the franchisees asserting this claim in another lawsuit if it becomes
 3 ripe.

4 **C. Remaining Claims**

5 Genuine disputes of material fact preclude summary judgment on IJL's remaining claims
 6 for declaratory judgment and breach of the implied covenant of good faith and fair dealing, as
 7 well as the franchisees' remaining claims for declaratory judgment, breach of contract, breach of
 8 the implied covenant of good faith and fair dealing, and violations of the MFA, WFDL, and
 9 IFDA.⁵ A reasonable jury could conclude that underpayment to IJL was not fraudulently
 10 motivated or made in bad faith, but instead resulted from myriad other issues or negligence.
 11 Such a breach would not be incurable, and that conclusion would implicate all remaining claims.
 12 I therefore deny summary judgment on these claims.

13 **D. Injunctive Relief**

14 IJL argues that the franchisees' request for injunctive relief is unripe "and will be
 15 rendered moot by [my] decision on IJL's request for declaratory relief." ECF No. 52 at 29. The
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19 ⁵ See, e.g., ECF Nos. 52-2 at 217 (allocating responsibility for the accuracy of Profit and Loss
 20 Balance Sheets to the franchisees); 52-2 at 217-18 (explaining that IJL invoiced the franchisees
 21 and automatically withdrew corresponding payments from their accounts, but also directed the
 22 franchisees to audit invoices for discrepancies); 52-3 at 135-36 (explaining that the franchisees
 23 trusted IJL to properly invoice royalties and withdraw payments accordingly); 52-4 at 159-60
 (providing that the franchisees overpaid IJL at times, and inaccurately represented revenues due
 to reporting limitations imposed by IJL's reporting system); 52-3 at 138 (discussing limitations
 of the IJL reporting app, and noting that IJL corporate was aware of these limitations); 52-1 at 36
 (directing franchisees to "establish and maintain" their own bookkeeping, accounting, and
 recordkeeping system for reporting purposes); 53-8 at 3 (blaming IJL's reporting system for any
 revenue discrepancies and underpayments).

franchisees do not respond. Because genuine disputes remain on some claims, I deny summary judgment on whether injunctive relief is appropriate.⁶

III. CONCLUSION

I THEREFORE ORDER that Defendant It's Just Lunch International, LLC's motion for
summary judgment (**ECF No. 52**) is **GRANTED in part** as set forth above.

6 DATED this 11th day of March, 2022.


ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

²³ ⁶ In addition, IJL stipulated not to terminate or non-renew any franchise agreements pending this litigation. ECF No. 52-4 at 168.